No. 1071 [redacted]379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923 1925

JAMES C. DAVIS, Director General and Agent (Norfolk Southern Railroad),

Petitioner,

v.

JOHN L. ROPER LUMBER COMPANY,

Respondent.

NOTICE, MOTION, PETITION AND BRIEF FOR WRIT OF CERTIORARI

R. M. HUGHES, JR., *Counsel.*

A. A. McLAUGHLIN, *Of Counsel.*

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NOTICE

To John L. Roper Lumber Company or Claude M. Bain, its Attorney of Record:

This is to notify you that the petitioner will, on the 2nd day of June, 1924, or as soon thereafter as counsel may be heard, present to the Supreme Court of the United States, in its court room at Washington, D. C., his motion for a writ of certiorari upon his verified petition and a copy of the entire record in this cause; and a copy of said motion, said petition and brief accompanying same are herewith delivered to you this 17th day of May, 1924.

JAMES C. DAVIS,
Director General and Agent,

By

R. M. HUGHES, JR.,
Counsel.

ACCEPTANCE OF SERVICE

The foregoing notice, and delivery of copy thereof and of motion and petition for writ of certiorari and brief are hereby acknowledged this 17th day of May, 1924.

CLAUDE M. BAIN,
Attorney for Respondent.

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MOTION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Now comes James C. Davis, Director General and Agent, petitioner, by his counsel, and moves this Honorable Court that it will by certiorari, or other process, directed to the Honorable Judges of the Supreme Court of Appeals of Virginia, require said Court to certify to this Court for its review and determination a certain cause in said Supreme Court of Appeals of Virginia lately pending, wherein the petitioner, James C. Davis, Director General and Agent, was plaintiff in error and John L. Roper Lumber Company, a corporation, was defendant in error; and to

that end the petitioner now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Supreme Court of Appeals of Virginia.

A. A. McLAUGHLIN,
R. M. HUGHES, JR.,
Counsel for Petitioner.

IN THE

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of James C. Davis, Director General and Agent, petitioner, hereinafter called defendant, respectfully shows to this Honorable Court:

1. On March 25, 1921, John L. Roper Lumber Company, a corporation, hereinafter called plaintiff, filed a notice of motion for judgment in the Court of

Law and Chancery of the City of Norfolk, Virginia, against John Barton Payne, Director General of Railroads, as operator of the Norfolk Southern Railroad, and as agent provided for under Section 206 of the Transportation Act of 1920. Said petition is found at pages 10 and 11 of the printed transcript of the record filed herewith. The said John Barton Payne was the predecessor in office of the present petitioner, James C. Davis, Director General of Railroads and Agent. The plaintiff sought and obtained a judgment for $1046.88 for the wrongful delivery in the summer of 1918 at Clarksburg, West Virginia, the bill of lading destination, of a carload of scrap iron shipped from New Bern, North Carolina, over the Norfolk-Southern Railroad and its connecting carriers, by the plaintiff to its own order, notify George Yampolsky. The shipment was delivered to the notify consignee without surrender of the order notify bill of lading.

2. The case was tried by the Judge of the Court of Law and Chancery of the City of Norfolk without a jury on an agreed statement facts, which is found in the printed record at page 12 (and is repeated verbatim in the opinion of the Supreme Court of Appeals of Virginia at page 23).

3. The case turns wholly upon the federal question whether, under Section 20 of the Interstate Commerce Act as amended, plaintiff was entitled to recover without having filed with the carriers within six months notice of claim.

It appears from the facts as agreed that the defendant admits wrongful delivery at destination, and the plaintiff admits that no claim was filed within six

months. The only question before the court is the legal question whether the provisions of Section 20 of the Interstate Commerce Act in force at the time excused the plaintiff from filing claim within the time provided under the bill of lading.

The third paragraph of Section 3 of the bill of lading conditions was in the following language:

> "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery, then within six months after a reasonable time for delivery has elapsed. Unless claims are so made, the carrier shall not be liable."

The closing sentence of Section 20 of the Interstate Commerce Act, as it read at the time that the alleged cause of action herein accrued, was as follows:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery. (24 Stat. 386, 34 Stat. 595, 38 Stat. 1196, 39 Stat. 441." 8 U. S. Comp. Stat., p. 9291, Sec. 8604).

The plaintiff contends that no notice of claim was required because the case comes within the language "damaged in transit by carelessness or negligence," as

found in this statute. It, therefore, becomes necessary to interpret the meaning of this statute and apply same to the facts of this case. It is obvious that the plaintiff in this case does not complain of loss "due to delay or damage while being loaded or unloaded." We may, therefore, simplify our problem by eliminating that phrase of the Act from consideration. With this elimination, the Act excuses filing of claim "if the loss, damage or injury complained of was due to * * * damaged in transit by carelessness or negligence."

4. The Court of Law and Chancery of the City of Norfolk entered judgment for the plaintiff on the 19th day of July, 1921 (R. 172).

5. Writ of error was awarded by the Supreme Court of Appeals of Virginia on the 6th day of June, 1922 (R. 9).

Upon this writ of error a hearing was had in the Supreme Court of Appeals of Virginia at Richmond on Wednesday, January 16, 1924 (R. 42). On the 20th day of March, 1924, the said court affirmed the judgment of the Court of Law and Chancery of the City of Norfolk by order appearing in the record at page 43; and the opinion in said Court appears in the record at pages 22 to 42, inclusive. (Reported in 122 S. E. 113.)

6. In the appellate proceedings in the Supreme Court of Appeals of Virginia the defendant assigned the following errors of the Court of Law and Chancery of the City of Norfolk (R. 2):

1. The court erred in overruling the defendant's motion for a new trial and in arrest of judgment, and in entering judgment against the defendant.

2. The court erred in holding that the plaintiff was entitled to recover against the defendant on the claim in suit without having given notice of said claim in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or within six months after a reasonable time for delivery, in accordance with the terms of the bill of lading.

3. The court erred in holding that the circumstances of the case brought the plaintiff within the terms of the Cummins Amendment to Section 20 of the Interstate Commerce Act excusing, under certain conditions, notice and filing of claim as a condition precedent to recovery.

The Supreme Court of Appeals of Virginia, in affirming the judgment of the Court of Law and Chancery of the City of Norfolk, committed the same errors as those assigned against the trial court; and this writ is sought to correct the said errors of the Supreme Court of Appeals of Virginia, as will appear from the record accompanying this petition, including the opinion of said court.

7. The judgment of the Supreme Court of Appeals of Virginia is a judgment of the highest court of the State of Virginia in which a judgment could be had in this cause, and the suit involves the federal question

of the rights of the defendant under the 20th Section of the Interstate Commerce Act of Congress of the United States as amended, and accordingly said judgment is reviewable by this court by certiorari or other process.

8. The question involved is one of great public importance since the effect of the decision is to nullify, in certain cases, the provisions of the uniform bill of lading adopted by all carriers following the passage of the Second Cummins Amendment.

The question involved is also one which calls for a decision of the Supreme Court in order to settle and harmonize conflicting decisions by different appellate courts, federal and state.

WHEREFORE, upon due consideration of this petition and the annexed brief, and the certified copy of the record of the Supreme Court of Appeals of Virginia filed herewith, the defendant and petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Appeals of Virginia, commanding that Court to certify and send to this Court on a date to be designated a full and complete transcript of the record of all proceedings had in this cause to the end that the same may be reviewed and determined by this Honorable Court under said writ as is provided by law. And petitioner prays that upon the final consideration of this cause, and of said writ, the said judgment of the Supreme Court of Appeals of Virginia be reversed by this Honorable Court and judgment rendered in favor of the defendant.

Petitioner further prays for such other equitable and general relief as may appertain to this case and as may be competent for this Honorable Court to grant.

R. M. HUGHES, JR.,
Counsel for Petitioner.

A. A. McLAUGHLIN,
Of Counsel.

STATE OF VIRGINIA,
CITY OF NORFOLK, } TO-WIT:

Before me, the undersigned notary public, personally appeared R. M. Hughes, Jr., who being duly sworn, deposes and says: That he is a member of the bar of the Supreme Court of the United States, and is of counsel for petitioner herein; that he has read the foregoing application for a writ of certiorari; and that all the facts therein stated are true and correct to the best of his knowledge and belief.

R. M. HUGHES, JR.

Subscribed and sworn to before me this 17th day of May. 1924.

JULIA K. GOFF,
Notary Public.

INDEX-ANALYSIS OF BRIEF.

IN THE

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BRIEF IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

We have set out in our petition the issue involved in this case.

At best, the language of the Cummins Amendment to Section 20 of the Interstate Commerce Act there quoted is incoherent and almost unintelligible. The English of the sentence defies analysis.

"But" (as said by the court in the Missouri case of *Loesch* v. *Union, &c., Co.*, 75 S. W. 621, 625) "courts are often required to discover meaning of contracts awkwardly expressed." And the same is equally true as to the meaning of statutes.

1. The plaintiff was not excused from filing claim because the damage complained of was not sustained while the shipment was "in transit."

In order for a plaintiff to bring himself within the exception excusing the filing of claim as provided in the statute under consideration, it is necessary not only that there should have been damage by carelessness or negligence, but that the alleged damage occur in transit.

The plaintiff is not excused from giving notice, because the property was not in transit when the defendant made wrongful delivery without requiring surrender of bill of lading. On the contrary, the property was at destination and transit was completed.

The precise question has been dealt with, and decided in favor of our present contention, by the First Department of Appellate Division of the Supreme Court of New York (May 2, 1919), and in the case of *Bell, et al* v. *New York Central R. Co.*, 175 N. Y. Sup. 712, from which case we quote as follows:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of the claims, to-wit: (1) Those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing

of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of claims as a condition precedent to recovery, but authorized a requirement that suit be instituted within two years.

In the bill of lading provision adopted under the authority of the amendment, we find first the requirement for the filing of a claim in non-transit cases within four months, which is a condition precedent to recovery. No provision whatever is made limiting the time within which suit may be instituted in the case of non-transit losses where claims are filed. The next sentence has for its purpose the fixing of a two-year limitation for the institution of suit in transit cases, and prescribes the period as two years. It reads:

'Suits for the recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within four months as above specified, shall be instituted only within two years,' etc.

It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, in that therefore it is one for a loss of which notice is not required, and for which a claim does not have to be filed in writing.

* * * * * * *

> The meaning of the provision in the bill of lading therefore is this: In non-transit cases, notice of claim must be filed with the carrier within four months, as specified, which is a condition precedent to recovery. In such cases, where the notice of claim is filed, the short statute of limitations does not apply. In all other cases, namely, transit loss cases, suit must be instituted within two years."

The New York case was the reverse of the case at bar because it was a transit case; and the case at bar comes within the category of non-transit cases wherein the New York court held filing of claim to be necessary. The only difference between the bills of lading in the two cases is that in the New York case the bill of lading was of a later vintage and had been revised to conform to the terms of the Cummins Amendment. In the case at bar such revision had not been made, but in contemplation of law the Cummins Amendment must be read into the bill of lading.

In the Texas case of *Royal Insurance Company* v. *Texas, &c., R. Co.* 115 S. W. 117, a fire policy on cotton exempted the insurer from liability for fire occurring on open cars in transit. The court held that cotton on a car stationary at the point of origin was not covered by the policy, and at page 121 defined "in transit" as meaning "literally in course of passing from point to point."

Two other Texas cases deal even more explicitly with this question, and are cited and quoted below.

Amory Mfg. Co. v. *Gulf, &c., R. Co., 37 S. W. 856, 857.*

"Was the cotton, while on the compress platform, 'in transit' within the meaning of the bill of lading? It is contended upon the one side that the words 'in transit' are the equivalent of the words '*in transitu*,' and that the goods in the hands of a carrier are in transit from the moment of delivery to the carrier until they reach the hands of the consignee. In a sense, the meaning of the two phrases is the same. The one is a literal translation of the other. But, as actually employed, they have a materially different meaning and application. 'In transit' means literally in course of passing from point to point, and such is its common acceptation. Such, also, is the literal meaning of the phrase '*in transitu*,' but, for the sake of convenience in defining the right of a creditor to stop goods which have been sold but not delivered to an insolvent purchaser, they have been given a broader technical signification. It may be doubted whether the phrase is ever used in our language in any other connection. It would seem, therefore, that, if the parties to the contract in question had desired to employ a single phrase which would cover the carrier's exemption from liability from the time the goods were received by it until it had delivered them to the consignee, they would have used the more comprehensive terms. Had they done so, a more difficult question would have been presented. But here the words 'in transit' the words actually used, according to their ordinary signifi-

cation, apply only to the cotton from the time the transportation was to begin until the time it was to end under the contract. The cotton, not having been set in motion towards its destination, was not in fact in transit; and we cannot hold it constructively in transit while on the platform, without unwarrantably extending the meaning of a well defined word, and doing violence to a well established canon of construction."

Gulf, &c., R. Co. v. *Pepperell Mfg. Co.* 37 S. W. 965.

"In an action against a railroad company for loss of cotton belonging to plaintiff it appeared that the cotton was placed on the platform of a compress company to be compressed; that, while it was in possession of such company, and on its platform, defendant executed bills of lading binding itself to transport it; and that it was afterwards burned while on such platform. Held, that such cotton was not 'in depot or place of transshipment,' nor, 'in transit,' within a provision in such bill of lading that neither such company nor any connecting carrier while 'in transit' or while 'in depot or place of transshipment,' etc., should be liable for loss."

The First Department of the Appellate Division of the Supreme Court of New York has handed down another decision in support of our contention that

notice is excused only in transit cases. The case of *Van Pelt* v. *Barrett*, 199 N. Y. S. 509, holds that the provision of an express receipt requiring four months' notice of claim is not valid in "transit" cases because it collides with the Cummins Amendment. This case is additional authority for our contention that notice is not, and cannot be, excused in non-transit or delivery cases, such as ours. To the same effect see *Lisberger* v. *Bush Terminal*, 197 N. Y. S. 281, 283.

It is pertinent at this point to discuss the two decisions chiefly relied upon by the Lumber Company and the Virginia Court to excuse notice in this case.

The first of these is *Hailey* v. *Oregon Short Line*, 253 Fed. 569. A study and analysis of this case will show that it in no wise contravenes our position in the case at bar. On the contrary, the Federal District Judge of Idaho accepts as a pivotal consideration the fact that the shipment in that case was in transit when the horses were injured, and holds that the shipment was in transit while not in motion at an intermediate point of transit between the origin and destination. This in no way conflicts with our contention that transit begins when the shipment starts on its journey and ends when it arrives at destination. We did not, and do not, contend for the meticulous and preposterous refinement that transit stopped wherever and whenever the train stopped. We can easily agree with the Idaho Judge in his ruling that transit does not mean "while actually moving." Thus it will appear that the Hailey case was a transit case, in which notice was not required under the construction and interpretation of the Cummins Act for which we contend. It is true

that the Hailey opinion closes with a dictum suggesting the classification, with respect to requiring notice, of all cases as negligence or non-negligence cases. But this suggestion was not necessary to the decision and was not the turning point of the case. The same suggestion has been made by our adversary and the Virginia Court (R. 33), and we shall deal with that point under a subsequent heading herein. It may be noted in passing that the Idaho Judge, in support of this suggestion, undertakes to transplant the comma which follows the word "unloaded" in Section 20 of the Interstate Commerce Act and "grow" it after the word "transit."

The other case upon which the Lumber Company places its chief reliance is *Gillette Safety Razor Company* v. *Davis*, 278 Fed. 864. Here again we have a case of loss and damage in transit. It is true that the loss occurred after goods reached defendant's receiving platform at destination and before they were loaded on trucks for delivery to consignee. But, in placing so much reliance and emphasis on this case, our opponent overlooked the fact that "the transactions out of which the suit arises took place between the plaintiff and the American Railway Express Company at a time when the latter was under federal control." An express company differs from a railroad in that it is the duty of the former to deliver shipments to consignee *at their residences or places of business.* So that with express companies the transit status continues until such delivery, while in the case of railroads it ceases upon arrival of shipment at its station at point of destination. Therefore, the Gillette case was also a transit case,

and the facts are such as to support, rather than contravene, our position, although it also contains dicta with reference to the purely negligence classification similar to those in the Hailey case. Of this more anon.

The North Carolina case of *Mann* v. *Fairfield*, 96 S. E. 731, was a transit case.

2. The case at bar comes within the category of a non-delivery case, as to which the filing of claim is required, rather than in that of a transit case, as to which the filing of claim is excused.

By reading the pertinent portion of the Cummins Amendment into the bill of lading provision under consideration, it appears that the statute contemplates transit cases and non-delivery cases. Thus interpreted, wrongful delivery without surrender of bill of lading is not a loss, damage or injury due to delay or damage in transit. On the contrary, the wrongful delivery comes within the bill of lading category of "failure to make delivery."

A similar provision was contained in the bill of lading involved in the case of *Blish Milling Co.* v. *Railway*, 241 U. S. 190, 195. At the time the Blish Milling Company shipment was made, the first Cummins Amendment had not been enacted, nor was there any statutory provision in reference to requirements for giving notice of claim or for filing claims. The facts in the Blish case were substantially identical with the facts here involved. There was a delivery without surrender of the bill of lading. Claimants sought to

avoid the effect of the bill of lading provision by ignoring the contract and suing for a conversion. The court, however, held that notwithstanding the form of the suit, the bill of lading provisions governed and were lawful and enforceable. It was contended that the provision with reference to failure to make delivery was inapplicable where delivery was made to the wrong party. The court in denying such contention said:

> "But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover *all cases* where the delivery has not been made as required When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instruction. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts

> of a particular transaction. The purpose of the stipulation is not to escape liability but to *facilitate prompt investigation.* And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

The first Cummins Amendment recognizes and puts in statutory form this doctrine, limiting it, however, to cases where the loss, damage, or injury is *not due* to delay or damage while loading or unloading, or in transit, due to carelessness or negligence of the railway company.

In the effort to extend and enlarge the meaning of the expression "in transit," the Virginia Court (R. 35, 36 and 41) undertakes to give it an interpretation synonymous with the term "transportation," and co-extensive with the whole field of carrier liability.

The expression "in transit" is not co-extensive with the expression "transportation." The very definition of transportation given by the Interstate Commerce Act shows that "in transit" is a sub-classification or sub-division of "transportation," because the words "in transit" are used in that very sense in the following quotation from the very first section:

> "The term '*transportation*' as used in this Act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage irrespective of

> ownership or any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer *in transit*, ventilation, refrigeration or icing, storage and handling of property transported."

The authorities cited relate merely to the scope of carrier liability in its entire field. We do not question the proposition which they lay down, but we do deny that the expression "in transit" comprehends the whole field of carrier liability, even if it is true that "transportation" does.

The North Dakota case of *Morrell* v. *Northern Pacific*, 179 N. W. 922, is of no assistance in the solution of our problem here because the provision under construction required notice only after delivery at destination, and the court held that such notice was unnecessary in that case because the shipment was never delivered at destination. But the third paragraph of Section 3 of the bill of lading, under construction in the case at bar, provides for such claim "in case of failure to make a delivery then within six months after a reasonable time for delivery has elapsed." And it is conceded that no claim was ever filed.

Winstead v. *East Carolina Ry.*, 118 S. E. 887, is an apparent ruling in favor of plaintiff on the point at issue. But the case contributes nothing to the problem because it does not even undertake to unravel the difficulty by any helpful discussion or reasoning. And, in holding that notice of claim is excused in case of total loss of property and in case of delay, the decision runs counter to numerous decisions which we shall herein-

after cite to the effect that the circumstances of total loss and delay damage are not within the exceptions excusing notice of claim.

The Honorable President of the Virginia Court, in interpreting the word "transit" to be co-extensive with the word "transportation," cites the previous recent Virginia decision of *Jennings* v. *Virginian Railway*, 30 Va. App. 1; 119 S. E. 14, wherein he was the author of the opinion. In that case by way of dictum, the Court indulged in the unnecessary inference that "transit" was co-extensive with "transportation," saying in the right hand column of page 151 of the opinion in 119 S. E.:

> "at any time while the goods are in transit —that is, at any time before the contract of carriage is completed."

Doubtless President Sims felt impelled to adhere in the case at bar to that inference.

3. It is obvious from the context of the act that filing of claim is excused only in case of damage to the shipment while in transit.

If the plaintiff should prevail in the contention that wrongful delivery at destination is covered by the language of the statutory provision under consideration, all of the provisions of the statute as to filing of claim would be nullified. The non-requirement of notice would apply to every conceivable case. That such is not the intent of the statute is plainly shown by reason of the fact that the very clause now under

consideration is in itself clearly an exception. The existence of an exception presupposes a general rule outside of the exception. The plaintiff's contention would render the exception so broad as to leave nothing outside of it.

This argument is strengthened, indeed becomes unanswerable, in the light of the provision of the statute immediately preceding the concluding provision we have been considering, which provision is as follows:

> "Provided, further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years."

It is obvious from the language of this provision that Congress has not intended to abolish completely the requirement of filing claim. And in the case at bar the plaintiff's failure to file claim within six months is in entire accordance with the requirements of these provisions of the statute which have been quoted and considered in this argument.

The plaintiff, having failed to file claim within six months, as required under the bill of lading, cannot recover.

The Virginia Court's answer to our suggestion that plaintiff's interpretation would so take the heart out of the provision under discussion as to nullify its effect is that a reasonable interpretation may be found in

excusing notice of claim only in negligence cases. While there have been some ill considered dicta to that effect among the decisions, it is plain from an examination of all the authorities that such an interpretation runs counter to numerous cases. The following cases hold that a total loss in transit is not a damage in transit within the meaning of the statute, and most, if not all, of them were negligence cases:

Missouri Pacific v. *Reed* (*Ark.*), 228 S. W. 1047;
Henningson Produce Co. v. *American Ry. Express* (Minn.), 118 N. W. 272;
St. Sing v. *Express Co.* (*N. C.*), 111 S. E. 730;
Conover v. *Railway*, 212 Ill. App. 29;
Freeman v. *A. C. L.* (*S. C.*), 113 S. El 69.

The following cases hold that delay is not a damage in transit within the meaning of the statute, and all of them were negligence cases:

Lisberger v. *Bush Terminal*, 197 N. Y. S. 281;
Van Pelt v. *Barrett*, 199 N. Y. S. 509;
Hylton v. *Hines* (*Kans.*), 206 Pac. 871.

Counsel for the Lumber Company conceded that a proper interpretation of the proviso dispenses with the filing of claim only with the following prerequisites concurring:

1. Loss or damage,
2. Occurring in transit,
3. From carelessness or negligence of carrier.

It probably appears from the record in the case at bar that the third of these requirements exists. It appears that the second did not exist, and that is sufficient to defeat the Lumber Company's case. It is very doubtful whether the first requirement is here present, and we shall discuss that feature under our next heading. But it is significant that in listing and enumerating these three prerequisites our opponent expressly abandoned his previous contention that notice of claim is required in all cases of negligence.

The object of the Cummins Amendment is to legalize contract limitations for claim and suit with the proviso, however, that the limitation as to claim is not permissible in cases of (1) "delay or damage while being loaded or unloaded" (irrespective of negligence) and (2) in cases where the goods are "damaged in transit by carelessness or negligence." Misdelivery is neither (1) delay or damage in loading or unloading or (2) damaged in transit. It violates any reasonable interpretation of the language of the proviso to construe the first class as governed by the words "by carelessness or negligence," which qualify only the second class, a shipment damaged in transit. It involves not only a violent but unnecessary disregard of punctuation and sentence structure to "spread" these qualifying words in the last class so as to make them cover the first class also. The *Lisberger* case (supra) illuminates this classification by the following language on page 283 of the opinion in 197 N. Y. Sup:

> "An examination of the language of the bill quoted above, shows clearly that the only

> cases in which notice is not required are: (1) Where the loss, damage or injury is due to delay, or damage while being *loaded or unloaded;* and (2) where the shipment is '*damaged* in transit by carelessness or negligence.'"

So far as it is enlightening to sound the legislative motives that underlie the notice proviso, it is easy to find classifications more plausible and reasonable than the negligence test for which the plaintiff contends. It is more likely that other reasons prompted Congress to provide for notice in certain cases and to excuse it in others. Carriers are obliged to handle a multitude of shipments through numerous agents, each performing but a small portion of the service. The carrier could not be expected to know of the existence of claims as a general proposition, and could not make investigation unless advised thereof with reasonable promptness. The purpose of notice is to permit the carrier to make investigation while occurrences are sufficiently recent to enable those engaged in transactions to remember and report the facts. Evidently it was thought less important to require notice in cases of delay, because the carrier has its records showing the movement, and they are ordinarily available for a considerable time. Presumably it was also thought that damage during loading and unloading would be known to the carrier because localized. Damage in transit due to negligence was treated in the same category. Something in the way of commission or omission would be involved which the carrier ought to have knowledge of. But a total loss in transit would ordinarily not be known to

the carrier. The destination agent would not know the shipment had been made, and would, therefore, not have reason to know of non-delivery. The receiving agent would, therefore, be ignorant that the shipment had not reached destination. In cases of loss prompt notice would be essential to enable the carrier to protect itself by investigation, locating the property if possible and making delivery, or ascertaining the cause of loss, such as theft or otherwise, and possibly recouping itself by means of the knowledge promptly obtained.

Every reason prompting Congress to require notice to the carrier in any case applies with double force to the case of the loss of a shipment.

In other words, the purpose of the statute was to authorize the carrier to protect itself against stale claims. The proviso limited its protection in cases where the carrier might be presumed for some reason not to need it. Perhaps it was thought that loading or unloading at one spot was easily ascertainable, and that, as a matter of policy, physical damage in transit attributable to carelessness ought not to be included. Congress evidently bore in mind the peculiarly difficult spots in the claim field of market damage in delay cases, of deterioration of perishables, and of concealed losses; and also the distinction between delay and physical damage in the common law. Without altering the common law burden, and with the main purpose of protecting the carrier against stale claims, Congress must be deemed to have made these exceptions to the reasonable rule of notice to cover only those cases where, for some reason, the carrier could be deemed less in need of the protection afforded by notice of claim.

Evidently the need was considered a vivid one in cases of non-negligent delay, of loss, and in the kindred category of misdelivery.

4. The word "damage" or "damaged" as used denotes damage to the shipment itself. The shipment was not damaged. Hence plaintiff does not come within the exception excusing notice.

Pages 28 to 32 of the opinion deal with this point. It is true that the word "damage" (generally in its plural form) often denotes financial loss to a person as distinguished from injury to the property. Indeed the word is used with that very meaning in the first part of the statutory provision which we are construing. But its use there with that meaning only serves to strengthen what is otherwise clear; namely, that its later use in the sentence under construction denotes damage or injury to the shipment itself.

In the case of *L. & N. Ry. Co.* v. *Bell*, 13 Ky. Law Rep. 393, the Court construed the meaning of the expression "recover damages for loss or injury to" live stock. It was held that the requirement of filing of claim under such language applied only to damage to the property. The plaintiff's loss in that case was attributable to delay, and the Court held that under such circumstances filing of claim was not a condition precedent to recovery. The case cited is the converse of the case at bar. In the case cited plaintiff was excused from filing claim because the word "damage" as used in the bill of lading stipulation requiring notice

was held to denote damage to the property, while the plaintiff's damage was occasioned by delay in delivery. In the case at bar plaintiff is not excused from filing claim, because the word "damage" in the provision of the statute excusing notice means damage to the shipment and the plaintiff's loss was occasioned by wrongful delivery.

In the case of *L. & N. R. Co.* v. *Smith*, 14 Ky. Law Rep. 814, it was held that a provision in a bill of lading requiring shipper, as a condition of recovery of damages for loss or injury to stock, to give notice within a certain time applied only to a claim for damage on account of physical injury to the stock in transit, and had no application to a claim for damage on account of delay in transit.

To the same effect is *Leonard* v. *C. & A. R. Co.*, 54 Mo. App. 366. In its decision the Court stated as follows with reference to a bill of lading provision requiring notice of claim for loss or damage:

> "But the defendant says that there was no offer of evidence to show that plaintiff had given notice of his damage within five days after arrival at Chicago, as the contract provides in the words heretofore set forth. In our opinion that clause of the contract relates to injury or damage to the cattle themselves, while in the possession of the defendant, and would, therefore, cover the shrinkage of the cattle. But such provision will not cover a damage which the shipper may suffer by a change in the market or the like. A change in the market has no

reference to an injury to the cattle and cannot be included within the terms of the provisions of the contract."

Against this position is cited the Virginia case of *Norfolk Truckers Exchange* v. *Norfolk-Southern*, 116 Va. 466. But this case only construes the meaning of the word "damage" as used in the opening sentences of the Carmack-Cummins Amendment imposing generally a vicarious liability upon initial carriers for loss, damage or injury; and holds that the word "damage" there used includes delay. Those words are covering words, so to speak, inclusive of all classifications afterwards made by the Act. When we come to the specific classes provided for in the exception, it is apparent that the word "damaged" is different from the word "damage" as used in the previous covering phrase. In fact, it is obvious that we are dealing in the exception with subclassifications. Not only that, but we have to construe, not the word "damage" but the word "damaged" the phrase "damaged in transit," and it would seem that this phrase definitely excludes the idea of delay.

The eight cases cited under point 3 preceding, holding that damage through total loss or delay is not within the meaning of the statute, are authority for our contention that "damaged" means damage to the goods shipped rather than loss, damage or injury to their owner.

5. In view of the public importance of the question at issue and the conflicting decisions thereon by various Appellate Courts, a writ of certiorari should issue, the decision of the Supreme Court of Appeals of Virginia should be reversed, and the Supreme Court of the United States should enter judgment for defendant.

The question involved is one of great public importance since the effect of the decision is to nullify, in certain cases, the provisions of the uniform bill of lading adopted by all carriers following the passage of the Second Cummins Amendment.

It is seen from the foregoing discussion that teh various appellate courts, federal and state, which have interpreted the proviso upon which this case must be determined have arrived at different conclusions and by divers lines of thought. We know of no better way to present and emphasize the importance of a ruling on this controverted question by this highest court of the land than by quoting the language of the Honorable President of the Supreme Court of Appeals of Virginia, who said in the opinion of that court in this case as written by him (R. 26) as follows:

> *"The decision of the question just stated is not free from difficulty. Its final decision will depend, of course, on the ruling of the Supreme Court upon it, but, as yet, there has been no decision of that high tribunal upon the precise question. There have been a few decisions of*

courts of lesser jurisdiction upon the question which, however, are not in harmony; and the ascertainment of the proper construction of the statute, upon the meaning of which the decision depends, is more than ordinarily difficult because of the phraseology and punctuation of the statute." (Italics ours).

Respectfully submitted,

R. M. HUGHES, JR.,
Counsel for Petitioner.

A. A. McLAUGHLIN,
Of Counsel.